

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the
Proposed Rules Governing
the Resource Planning
Process for Electrical
Utilities, Minn. Rules,
Parts 7843.0100 to 7843.0600.

REPORT OF THE
ADMINISTRATIVE -AW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on April 5, 1990, at 9:00 a.m. in the Commission's Large Hearing Room, 780 American Center Building, 150 East Kellogg Boulevard, St. Paul, Minnesota.

This report is part of a rulemaking proceeding held pursuant to Minn. Stat. 14.131 to 14.20 to hear public comment, to determine whether the Minnesota Public Utilities Commission (the "Commission") has fulfilled all relevant substantive and procedural requirements of law or rule, to determine whether the proposed rules are needed and reasonable, and to determine whether or not the rules, if modified, are substantially different from those originally proposed.

John Kingstad, Special Assistant Attorney General, 707 American Center Building, 150 East Kellogg Boulevard, St. Paul, Minnesota 55101, appeared on behalf of the Commission at the hearing. The agency panel appearing in support of the proposed rules consisted of David Jacobson, Statistical Analyst for the Commission; Richard Lancaster, Energy Division Manager; Dan Lipschultz, Staff Attorney; and Commissioner Cynthia Kitlinski.

Thirty-one persons attended the hearing. Fourteen persons signed the hearing register. The Administrative Law Judge received nineteen exhibits from the Commission into evidence during the hearing. Six exhibits were received into evidence from members of the public in attendance at the hearing. One exhibit was received from the Office of the Attorney General. The hearing continued until all interested persons, groups, or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until

April 25, 1990, twenty (20) calendar days following the date of the hearing. Pursuant to Minn. Stat. 14.15, subd. 1 (1988), three business days were allowed for the filing of responsive comments. On April 30, 1990, the rulemaking record closed for all purposes.

Thirteen post-hearing comments were received by the Administrative Law Judge. The Commission submitted a written comment responding to matters discussed at the hearing and a supplementary response during the three-day period.

This Report must be available for review by all affected individuals upon request for at least five working days before the Commission takes any further action on the rules. The Commission may then adopt a final rule or modify or withdraw its proposed rule. If the Commission makes changes in the rule other than those recommended in this report, it must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the Commission must submit it to the Revisor of Statutes for a review of the form of the rule. The Commission must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS-OF FACT

Procedural- Requirements

1. On January 22, 1990, the Commission filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules certified by the Revisor of Statutes.
- (b) the Order for Hearing.
- (c) the Statement of Need and Reasonableness; and
- (d) the Notice of Hearing proposed to be issued.

2. On February 7, 1990, the Commission mailed the Notice of Hearing to all persons and associations who had registered their names with the Commission for the purpose of receiving such notice.

3. On February 12, 1990, the Notice of Hearing and a copy of the proposed rules were published at 14 State Register 1994.

4. On March 7, 1990, the Commission filed the following documents with the Administrative Law Judge:

- (a) the Notice of Hearing as mailed;
- (b) the Agency's certification that its mailing list was accurate and complete;
- (c) the Affidavit of Mailing the Notice to all persons on the Agency's list;
- (d) the names of Commission personnel who would represent the Agency at

- the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf; and
- (e) a copy of the pages of the State Register on which the notice was published.

These documents were timely filed by the Department pursuant to Minn. Rule 1400.0600.

7. All documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing to April 30, 1990, the date the rulemaking record closed.

Nature of the Proposed Rules

8. The proposed rules create a system of periodic reviews whereby large electric utilities present resource plans for public and Commission input. The resource plans would consist of an integrated evaluation of supply-side resource options (for example, new power plants) and demand-side resource options (for example, conservation by utility customers over a fifteen-year forecast period). The process is intended to be advisory in nature: no binding authority is granted by the process and no person or group would be able to veto proposed actions by the utilities. The Commission would issue a decision consisting of findings of fact and conclusions addressing the need for utility services and the resource options most appropriate to meet those needs. Although the decision would not require the utility to follow a particular resource plan, it would identify in a broad fashion the resources and actions that are likely to receive favorable treatment from the Commission in later ratemaking, conservation improvement program, certificate of need, and other proceedings. The proposed rules include definitions, filing procedures, required contents of resource plans, factors to be considered by the Commission in reviewing the plans, and provisions relating to the relationship of the resource planning process to other regulatory proceedings.

Statutory Authority

9. In its Statement of Need and Reasonableness ("SONAR"), the Commission cites Minn. Stat. § 9; 216B.13; 216B.16, subd. 6; 216B.164; 216B.24, subd. 2; 216B.241, subd. 2; 216B.243; 216B.33; and 216C.05 as authority for the adoption of the proposed rules. These provisions may be briefly summarized as follows:

- (1) Minn. Stat. 2168.03 requires the Commission to set reasonable rates and, "[t]o the maximum reasonable extent, set rates to encourage energy conservation and renewable energy use and to further the goals of sections 216B.164 [relating to cogeneration and small power production], 216B.241 [relating to energy conservation improvements], and 216C.05 (relating to findings and purpose of chapter 216C)."
- (2) Minn. Stat. 216B.08 sets forth the general duties of the Commission. Included in those duties is the general authority to make rules. The only restriction on that rulemaking authority is that the rules be "in furtherance of the purposes of Laws 1974, chapter 429" (now codified as Minn. Stat. Ch.

216B) .

- (3) Minn. Stat. 216B.09 provides that the Commission "may ascertain and fix just and reasonable standards, classifications, rules, or practices to be observed and followed by any or all public utilities with respect to the service to be furnished
- (4) Minn. Stat. 216B.13 authorizes the Commission to require production of the records of any public utility operating in Minnesota, so long as the request is "pertinent to any lawful inquiry."
- (5) Minn. Stat. 216B.16, subd. 6, sets forth the factors to be considered by the Commission in setting "Just and reasonable" rates and provides, inter alia, that the Commission "shall give due consideration to the public need for adequate, efficient, and reasonable service and to the need of the public utility for revenue sufficient to enable it to meet the cost of furnishing the service
- (6) Minn. Stat. 216B.164 states the Legislature's intent to encourage cogeneration and small power production to the extent consistent with protection of the ratepayers and the public.
- (7) Minn. Stat. 216B.24, subd. 2, specifically empowers the Commission to make rules requiring public utilities to file Plans showing any contemplated construction of major utility facilities.
- (8) Minn. Stat. 216B.241, subd. 2, provides that the Department of Public Service may require a utility to make cost-effective investments and expenditures in energy conservation improvements and specifies that the Department shall "insure that every public utility operate [sic] one or more programs . . . that make significant investments in and expenditures for energy conservation improvements." This statute also authorizes the Commission to rule on petitions to modify or revoke the Department's decision to require an energy conservation program.
- (9) Minn. Stat. 216B.243 authorizes the Commission to review the need for specific large energy facilities proposed for construction and adopt assessment of need criteria. In assessing the need for the proposed facility, the statute requires that the Commission evaluate such factors as the accuracy of long-range energy demand forecasts on which the necessity for the facility is based, the effect of existing or possible energy conservation programs, the relationship of the proposed facility to overall state energy needs, environmental quality considerations, economic effects, policies and rules of other regulatory bodies, and alternatives for satisfying the demand for the energy to be provided by the proposed facility.

(10) Minn. Stat. 216B.33 requires Commission orders, findings, authorizations, or certificates to be in writing and to be received as evidence in any proceeding as to the facts stated therein.¹/

(11) Finally, Minn. Stat. 216C.05 sets forth the general findings and purpose of the Legislature with respect to energy use and planning. The statute declares that "the state has a vital interest in providing for: increased efficiency in energy consumption, the development and use of renewable energy resources wherever possible, and the creation of an effective energy forecasting, planning and education program," and finds that "it is in the public interest to review, analyze and encourage those energy programs that will minimize the need for annual increases in fossil fuel consumption by 1990 and the need for additional electrical generating plants, and provide for an optimum combination of energy sources consistent with environmental protection and the protection of citizens."

The Commission contends that these statutory provisions, taken as a whole, provide appropriate authority for the Commission to promulgate the proposed rules. The Commission argues that these statutes delineate the responsibilities of the Commission and state government in areas which constitute key elements of the resource planning process, such as ratemaking, service conditions, energy conservation, alternative energy use, cogeneration and small power production, power plant and transmission tire need assessment, and environmental protection, and argues that "[t]he resource planning process will tie together these various responsibilities in a forward-looking manner to increase the effectiveness and efficiency of other processes and of electric utility regulation as a whole." SONAR at 3.

Northern States Power Company ("NSP"), Minnesota Power Company, and Otter Tail Power Company objected to the proposed rules on the ground that the Commission lacks statutory authority to adopt the rules as proposed. They argue that the proposed rules suffer from four primary defects: (1) none of the statutes on which the Commission relies authorize intensive Commission involvement in a utility's long-range resource planning; (2) the proposed

rules diverge from prior court and Commission decisions that have narrowly defined the Commission's authority to adopt new programs and policies; (3) the proposed rules encroach upon the jurisdiction of the DPS and the EQB, and intrude upon the responsibilities of electric utilities; and (4) the proposed rules conflict with statutorily-mandated Certificate of Need and ratemaking processes. In particular, the utilities contend that the statutory provisions cited by the Commission as authority primarily relate to the Commission's authority to establish service conditions and set rates rather than supervise long-range resource planning. They argue that the proposed rules also exceed the authority provided by section 216B.24 because that provision is limited to the construction of major utility facilities and does not extend to plans relating to both supply-side and demand-side options.

1/ This statute relates to proposed rule 7843.0600, subpart 2, and will be discussed in conjunction with that rule part.

They further contend that the Legislature's recent transfer of certain authority under the CIP process from the Commission to DPS and the failure of the Legislature to enact a bill (SF 2006) that was pending before the Minnesota Senate which would have given the Commission express authority to promulgate resource planning rules provide further evidence that the Commission lacks authority to promulgate the proposed rules.

The utilities have presented an overly restrictive analysis of the proper scope of the Commission's rulemaking authority. The Commission has authority

pursuant to Minn. Stat. 216B.08, 216B.09, 216B.13, and 216B.24 to promulgate rules to further the purposes of Chapter 216B, to ascertain and fix

rules to be followed by any or all public utilities with respect to the furnishing of service, to require production of utilities' books and records pertinent to any lawful Inquiry, and to promulgate rules concerning the submission of plans showing any contemplated construction of major utility facilities. The purposes of Chapter 216B include the setting of rates to encourage energy conservation and renewable energy use, the encouragement of cogeneration and small power production to the extent consistent with protection of ratepayers and the public, the encouragement of investments in cost-effective energy conservation improvements, and the assessment of the need for proposed facilities based upon the evaluation of such factors as long-range energy demand forecasts, energy conservation programs, and alternatives for satisfying energy demands. By virtue of Minn. Stat. 216B.03,

Chapter 216B also encompasses the directive to further the goals of Minn. Stat. 216C.05. Those goals include increasing efficiency in energy consumption, developing and using renewable energy resources where possible, and creating an effective energy forecasting, planning and education program.

None of these statutory provisions expressly direct the Commission to promulgate resource planning rules. It is obvious, however, that the rules that have been proposed by the Commission have as their objective the furtherance of many of the goals and purposes set forth above, such as energy conservation planning, the anticipated need for additional facilities, and the

evaluation of alternatives for meeting energy demands. The proposed rules do not supplant or otherwise conflict with the certificate of need or ratemaking processes set forth in Chapter 216B. The rules do not purport to vary the timetables set forth in these statutory provisions or the rules that have been

promulgated under them. Moreover, because the resource planning process is advisory in nature, the certificate of need process will continue to be the procedure which governs the authority to construct major utility facilities. The Administrative Law Judge thus concludes that the proposed rules fall within the objectives and powers expressly given to the Commission. See *Peoples Natural Gas Co. v. Minnesota Public Utilities Commission*, 369 N.W.2d 530, 534 (Minn. 1985).

The mere fact that the Legislature transferred to DPS some of the Commission's CIP authority and that the Legislature failed to enact SF 2006, without more, does not provide persuasive evidence that the Legislature did not intend that the Commission promulgate resource planning rules. The Commission retains responsibility for CIP as the body that hears challenges to

the CIP decisions of DPS, and energy conservation improvements are among the

purposes of Chapter 2166 which the Commission is empowered to further through its rulemaking authority. The failure of SF 2006 to clear committee is not determinative of the existing scope of rulemaking authority that has been

granted to the Commission and does not substantiate a claim that authority is lacking, particularly where the Commission did not draft or seek passage of the bill, the committee failed to vote on it for lack of a quorum, and some legislators apparently argued that there was no need to pass the proposed legislation because the Commission already had the ability to take such action. In the absence of any additional information in the record reflecting the Legislature's intent with respect to the bill and the transfer of CIP authority, the Administrative Law Judge cannot ascribe any definitive meaning to these factors. In addition, even assuming, arguendo, that the Commission has on past occasions promulgated regulations or taken other actions only after specific legislation was enacted authorizing such rules and actions, the Commission's past reticence to act does not support a finding that the Commission has only narrow rulemaking authority or lacks rulemaking authority in this particular instance. The statutory authority may be present for broader rulemaking authority, regardless of whether an agency has made use of that authority.

The Administrative Law Judge thus concludes that the Commission has statutory authority to enact the proposed rules.

Small Business-Considerations in Rulemaking

10. Minn. Stat. 14.115, subd. 2, requires state agencies proposing rules affecting small businesses to consider methods for reducing adverse impact on those businesses. In the SONAR, the Commission asserted that the proposed rules will not affect small businesses. The public utilities affected by these rules do not fall within the definition of small business. No one objected to the rules as having any adverse impact on small businesses. Minn. Stat. 14.115, subd. 2, thus is not applicable to the proposed rules.

Fiscal Note

11. Minn. Stat. 14.11, subd. 1, requires agencies proposing rules that will require the expenditure of public funds in excess of \$100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two-year period immediately following adoption of the rules. Because the proposed rules will not require any expenditure of funds by a local agency or school district, this statute is inapplicable.

Impact on Agricultural Land

12. Minn. Stat. 14.11, subd. 2, requires proposers of rules that may have a "direct and substantial adverse impact on agricultural land in this

state" to comply with the requirements of Minn. Stat. 17.80 through 17.84.

The proposed rules have no impact on agricultural land and, therefore, these statutory provisions do not apply.

Analysis of Substantive Provisions

13. Because many provisions of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The portions of the proposed rules that received significant critical comment or otherwise need to be examined will be discussed below. Where a particular comment applied to several subparts of the proposed rules, the analysis will not be repeated. The Administrative Law Judge specifically finds that the need for and reasonableness of the provisions that are not discussed in this Report have been demonstrated by an affirmative presentation of facts, and that such provisions are specifically authorized by statute.

A. Need for and Reasonableness of the Proposed Rules in General

14. The utilities commenting on the proposed rules have challenged them in general on the basis that the Commission has not shown the resource planning process to be either needed or reasonable. These general concerns will be addressed prior to considering the specific comments that focus upon particular provisions of the proposed rules.

Need for the Resource Planning-Process

The utilities have objected to the proposed rules as duplicating existing requirements of the Department of Public Services ("DPS") and the Environmental Quality Board ("EQB"). The utilities argue that, because an Advance Forecast is prepared for DPS and EQB and a Conservation Improvement Program ("CIP") is submitted to DPS, the resource planning rule is an unnecessary duplication of utility effort. Further, the utilities argue that their excellent record in resource planning and promoting conservation by customers shows that a formal resource planning process is not needed.

The Commission responds to those arguments by pointing out that the existing processes have no mechanism to promote public input. Neither the Advance Forecast nor the CIP processes are directed toward the specific facts needed to assess the long-term need of new generating capacity or the impact of demand-side conservation. Moreover, while CIP filings are intended to cover only a two-year period, utilities begin planning for construction of major facilities fifteen to sixteen years prior to the anticipated date that the new facility will go into operation.

The overall desirability of least cost planning is not disputed. The injection of public input into a heretofore closed process may promote greater awareness of, and participation in, demand-side conservation practices. With the large financial investment required for major facility construction and the potential for constructing excess generating capacity, additional assessment of whether that construction will be necessary 's beneficial. An integrated evaluation of supply-side and demand-side resource options will provide a more accurate long-term picture of the future need for energy supplies at the time when the options for obtaining those supplies are being considered.

The Commission has demonstrated that the resource planning process is needed.

Reasonableness of the Resource Planning Process

The utilities have alleged that the proposed rules are unreasonable primarily on the following grounds: 1) the failure of the Commission to coordinate the resource planning process with proceedings of other state agencies; 2) the lack of proper timing with respect to Commission decisions on the ultimate issue in this process; and 3) the vagueness of the proposed rules regarding fundamental concepts of the review process.

The utilities' coordination objection is based on the fact that jurisdiction for various aspects of utility regulation resides with several different agencies. Jurisdiction with respect to conservation lies primarily with DPS, and jurisdiction with respect to plant siting lies with EQB. The Commission, by itself, cannot properly assure the utilities that these other agencies will accept decisions made under the resource plan process. Moreover, the actual scope of decisions made by the Commission pursuant to the resource process would not extend to the substantive decisions made by EQB or DPS. In fact, since the resource planning process will at most produce a decision which, if introduced in a later proceeding, could constitute prima facie evidence of the need for a "generic" facility, the EQB siting decision will not be affected.^{2/} Most importantly, however, the utilities have not shown that the Commission, the EQB and DPS would not work together in coordinating the resource planning process with the existing Advance Forecast and CIP processes. To the contrary, both DPS and the EQB have supported the proposed rules in comments submitted during this rulemaking proceeding. The Advance Forecast document is already being submitted to both EQB and DPS to satisfy different filing requirements. There has been no suggestion that, with certain alterations, the Advance Forecast document would not be acceptable to the Commission to satisfy the resource plan filing requirement.

With respect to the timing of the resource plan filings under the proposed rules, NSP expressed concern that the lack of a deadline for a Commission decision with respect to the utility's resource plan filing would result in a constant need to file additional information after the original filing. Under NSP's scenario, the utility's plan would be filed on January 31 and the utility would continue to update the information throughout the Commission's consideration of that plan. The Commission would be unable as a practical matter to approve or reject the resource plan owing to the continual influx of new information requiring reevaluation. The Commission clearly anticipates no extraordinary difficulty in resolving each particular proceeding in a timely fashion. The Commission has anticipated the potential need for additional proceedings to be held in certain situations through proposed rule 7843.0500, subp. 5, which permits the Commission to hold additional administrative proceedings prior to the next regularly scheduled resource plan proceeding if changed circumstances have occurred that may significantly influence the selection of resource plans. Both the Commission and the utilities have emphasized the importance of flexibility in the process, and the proposed rules are not unreasonable by virtue of their failure to specify a date by which the Commission must issue a decision.

2/The linkage between the Commission's certificate of need process and EQB's siting process is already overlapping. According to the Commission, the EQB hearings held as part of the Sherco 3 siting process focused upon demand issues and did not consider which location was most appropriate. The proposed rules will permit much of the demand argument to be made in advance of and apart from the siting process.

NSP objected to the portion of the proposed rule governing the Commission's review of resource plans as being too vague. Specifically, the five factors to be used by the Commission in evaluating the utilities' plans are alleged to be unclear in their application. NSP cites proposed rule 7843.0500, subp. 3(D) as an example of its argument. That subpart requires resource options and resource plans to be evaluated on their ability to enhance the utility's ability to respond to changes in the financial, social, and technological factors affecting its operations." The SONAR states that the purpose of subpart 3(D) as well as the other factors set forth in subpart 3 is to encourage flexibility in resource planning. The Commission seeks to foster this flexibility in lieu of commitment to a few resource options, which could lead to plant disallowances, uncompleted construction of facilities, or rate increases. NSP itself has stressed the uncertain nature of advance forecasts and indicates that it has responded to this condition with multiple demand scenarios and "maintaining a portfolio of practical demand and supply resources to meet such forecasts." (NSP Exhibit 2, Section III, F-1). This response would appear to the Administrative Law Judge to satisfy the requirements of subpart 3(D) of the proposed rules. The need for subjective evaluation that is reflected in the five factors set forth in the proposed rules is endemic to the process of resource planning. Where quantitative specificity cannot be obtained, an agency may use qualitative criteria. See *Can Manufacturer's Institute, Inc. v. State*, 289 N.W.2d 416 (Minn. 1979). The criteria included in the proposed rules are not unreasonably vague. Proposed rule 7843.0500, subpart 3, sets forth a reasonable specification of the factors that will be used to assess the utilities' resource plans.

B. Section-by-Section Analysis of the Proposed Rules

Proposed Rule 7843.0100 -- Definitions

15. Proposed Rule 7843.0100 contains eleven subparts defining the terms to be used in the proposed rules. Commentators objected to the definitions of "electric utility," "party," "resource plan," and "socioeconomic effects" contained in subparts 5, 8, 9, and 10. The objections to the "electric utility" definition are discussed in paragraph 16 below. The recommendation that the definition of "party" contained in the proposed rule be modified to refer to entities permitted by the Commission to intervene was properly

declined by the Commission on the grounds that the suggested language would be misleading because, in certain instances, an administrative law judge may rule on a petition for intervention.

Otter Tail Power and Minnesota Power objected to the reference in the definition of "resource plan" to the "ranking" of resource options. In response, the Commission modified the language of the proposed rule to refer instead to a "set of resource options that a utility could use including an explanation of the supply and demand circumstances under which, and the extent to which, each resource option would be used to meet those service needs."

Otter Tail Power Company also suggested that the definition of "socioeconomic effects" be revised to quantify the concept or restrict its weight in the decision-making process. The Commission declined to modify the rule based upon its view that, while the concept of socioeconomic effects is

important in the process, it is difficult or impossible to quantify or assign in the proposed rules the proper weight to be given to particular information.

Following the hearing, the Commission modified the definition in subpart 4 of "contested case proceeding" to refer more specifically to proceedings instituted under Minn. Stat. 14.57 through 14.62.

The Administrative Law Judge finds that these definitions, as modified, have been shown to be needed and reasonable to promote clear comprehension of the applicability of the rules. The Judge finds that the modifications made to the language of the proposed rules following the hearing merely clarify the definitions in this rule part and do not constitute a substantial change.

Proposed Rule 7843.0200, subp. 2 -- Scope

16. This subpart of the proposed rules indicates that only electric utilities with more than 1,000 retail customers in Minnesota must comply with the resource planning rules. The Commission chose 1,000 customers as the benchmark because no small utility is near that number in customers.

The utilities suggested that gas utilities and all cooperative and municipal electric facilities be included in the resource planning process if such a process is to be implemented. They also objected to the exclusion of small utilities from compliance with the proposed rules, and argued that small utilities will be able to use the information contained in resource planning filings to lure away existing clients from the large utilities.

The Commission supports this proposed rule part by asserting that the greatest benefits will accrue from the largest utilities and that the time and costs of the process would outweigh the benefits for small utilities. The Commission contends that the cost and environmental characteristics of the electric utility industry make it the logical starting point for the resource planning process. In response to the utilities' comments, the Commission pointed out that municipal facilities may only elect to become subject to Commission regulation with respect to their accounting systems and their depreciation rates and practices, and thus were not within the broad scope of regulation encompassed by the resource planning process. The Commission further emphasized that involvement of the generation/transmission and distribution organizations of cooperative facilities would expand the process so dramatically that it could not be undertaken with existing staff. The four utilities encompassed within the definition contained in the proposed rules serve more than 60 percent of Minnesotans and supply more than 70 percent of the utility-generated electrical energy consumed in Minnesota. The Commission also asserted that the bulk of the information required to be filed is already public data through the utility's compliance with the filing requirements of the Mid Continent Area Power Pool for the U. S. Department of Energy and the Advance Forecast. In addition, the Commission expressed willingness to use its established methods of protecting proprietary data in the resource

planning process.

The Commission has shown that proposed rule part 7843.0200, limiting the scope of the rules to large electric utilities, is needed and reasonable to efficiently carry out the resource planning process.

Proposed Rule 7843.0300 -- Filing Requirements and Procedures

17. This proposed rule part sets forth the specific requirements to be met by utilities filing resource plans. Subparts 4, 9, 10, 11 and 12 received critical comment.

Under subpart 4, an exemption may be granted upon a utility's written request if the utility shows that the particular data is not needed or can be obtained through another document. Any exemption request must be filed at least 90 days prior to the plan due date and interested persons may submit comments concerning the exemption request within 30 days. In response to comments received, the Commission considered whether it should modify this subpart to include a deadline for Commission action on an exemption request and provide that the exemption will be deemed approved if the Commission does not respond by the deadline. It declined to do so, based on its view that the Commission will act on such requests in an expeditious fashion, it would be counterproductive to set an arbitrary deadline, and an automatic exemption would be inappropriate and could, in any event, be overridden by a request for an augmented or clarified filing under subpart 3. The Administrative Law Judge finds that subpart 4 is needed and reasonable as originally proposed.

In reaction to comments made by Otter Tail Power Company, the Commission altered the language of subpart 9 to require that the resource planning process be conducted as an uncontested proceeding, unless a "contested case hearing is required by statute or constitutional right." The Commission also altered the definition of "uncontested proceeding" contained in subpart 9 so that it includes all proceedings before the Commission except those matters referred to the Office of Administrative Hearings under Minn. Stat. 14.57 to 14.62. The Commission properly declined to modify subpart 9 to require that a contested case proceeding would be initiated upon the request of any party to the resource planning process, since such an approach would exceed the requirements of the Minnesota Administrative Procedure Act. The alterations made by the Commission to subpart 9 clarify when a contested case proceeding is appropriate and do not constitute substantial changes.

The

Commission may wish to change the reference to "contested case hearings" in the new language to "contested case proceedings" in order to conform subpart 9 with the definitions of proposed rule 7843.0100. The use of "hearings" is not a defect and the substitution of the word "proceedings" would not constitute a substantial change.

Subpart 10 sets November 1 of the filing year as the deadline for parties and other interested persons to comment on the utility's resource plan (including the filing of an alternative resource plan). Subpart 11 permits parties or other interested persons to support the utility's proposed resource plan or file an alternative resource plan. Subpart 12 allows responsive comments to all the filings made by any utility, agency, or interested person from November 1 to December 31 of the filing year. The utilities asserted that the responsive comment period is too short to permit the utilities to effectively respond to the comments received from other interested parties, particularly because the utilities would be engaged with other Commission-required filings at the time these comments were due. The alternative approaches suggested by the utilities were to (1) change the deadline for comments and alternative resource plans from November 1 to October 1, or (2) set January 31 as the date for ending the period for

responsive comments by the facilities. The Commission has declined to alter any of the deadlines in the proposed rules because it anticipates that the primary work will occur during the preparation of the utility's own resource plan, and thus less work will be required during the responsive comment period; pushing back the deadline for responsive comment would delay the process; and decreasing the time allowed for comments and alternative plans would not provide sufficient time for commentators to study and respond to the utilities' filings.

With respect to subpart 11, the utilities also argued that alternative plan filings should be required to meet the same standards and requirements as the utilities' proposed resource plans. The Commission has declined to modify this rule provision based upon its view that it would be pointless to require the resubmission of non-objectionable information from the utilities' filings. The Commission emphasized that an acceptable alternative plan would have to describe the objectionable elements of the utility's plan and provide reasons why the alternative plan is preferable. The language used in subpart 11 in fact specifies that, "[w]hen a plan differs from that submitted by the utility, the plan must be accompanied by a narrative and quantitative discussion of why the proposed changes are in the public interest, considering the factors listed in part 7843.0500, subpart 3." Proposed Rule 7843.0300, subp. 11 (emphasis added). This subpart is needed and reasonable as proposed.

The provisions set forth in subparts 10, 11 and 12 of proposed rule part 7843.0300 all fall within the Commission's broad grant of rulemaking authority and have been demonstrated to be needed and reasonable,

Proposed Rule 7843.0400 Contents of Resource Plan Filings

18. Subparts 2 and 3 of this proposed rule part received critical comments. In response to comments received during and following the hearing regarding the use of a "ranking" concept in the definition of "resource plan," the Commission modified the language of proposed Rule 7843.0400, subpart 2, to delete language referring to ranking and insert new language requiring the resource plan to "specify how the implementation and use of those resource options would vary with changes in supply and demand circumstances." The modification clarifies the rule and the Commission's concern that the resource plan reflect the dynamic nature of the planning process, and does not constitute a substantial change.

Otter Tail Power suggested that subpart 2 be further modified to allow the

Commission to accept additional information in confidence, and DPS proposed that additional language be added to subpart 2 to require that the resource plan include an assessment of potential energy savings of available demand-side measures. The Commission declined to alter the proposed rules, emphasizing that it already has policies in place for dealing with trade secrets and proprietary information and that the rule already calls for the submission of the type of information covered by the DPS proposal. The failure to modify the proposed rule in response to these suggestions does not render it unreasonable. The Commission has shown that subpart 2 is needed and reasonable as originally proposed.

In response to additional comments by Otter Tail Power, the Commission modified the language of the last sentence of item A of subpart 3 to state that the supporting information included in the resource plan filing must

include a general evaluation of each option that could meet a significant part of the need identified by the forecast, "including the extent of its availability, reliability, cost, socioeconomic effects, and environmental effects." The modification eliminates the confusing reference to "natural" effects, received no adverse comment, clarifies the rule, and does not constitute a substantial change.

Finally, the Commission modified the language of subpart 4 of proposed Rule 7843.0400 to require the inclusion of information in the nontechnical portion of the resource plan relating to the activities required over the next five years to implement the plan (rather than the next two years, as originally proposed). This modification was not criticized in the post-hearing comments, corrects an oversight in the proposed rules, and renders the time frame under subpart 4 consistent with that specified in subpart 3. The modification does not constitute a substantial change.

Proposed_Rule 7843.0500 -- Commission Review of Resource Plans

19. Subpart I of this proposed rule part provides that, based upon the information filed in the resource plan proceeding, the Commission will issue findings of fact and conclusions with respect to the utility's proposed resource plan and the alternative resource plans. The proposed rule authorizes a delay in the issuance of a decision by the Commission if it finds that the information is insufficient. The utilities suggested that subpart I be revised to specify a deadline for the Commission's decision (or for how long it may delay the issuance of the decision) and to mandate that the Commission's failure to act be deemed to constitute approval of the utility's proposed plan. The Commission declined to modify the proposed rule as suggested, pointing out that establishment of a specific deadline is not necessary or appropriate given the interest that all participants in the process have in reaching a final decision. The Commission indicated that the automatic approval approach urged by the utilities could present obstacles to the overall goal of choosing resource options that impose the least costs on society and could provide incentives to utilities to cause delays in the process. The proposed rule has been shown to be needed and reasonable as originally proposed.

Subpart 2 was altered after the hearing to delete the reference to a "ranked" set of resource options, in response to comments discussed above with respect to proposed Rule 7843.0100, subpart 9, and 7843.0400, subpart 2. This modification clarifies the rule and does not constitute a substantial change. The Commission declined to modify the portion of subpart 2 that provides that the Commission "may" identify a particular set of resource options as a preferred plan and that the preferred plan need not have been proposed by any particular utility or other person. The Commission has demonstrated that the flexibility to fashion the best possible plan based upon available resource

options is needed and reasonable. Moreover, the failure of the Commission to modify the proposed rule to establish a binding approval process in accordance with the proposal of the DPS and the comments of some of the utilities does not render the rule unreasonable. Pursuant to the DPS proposal, a utility would be unable to consider a resource option that was not included in the Commission-approved resource plan and the Commission and others would be barred from later considering whether the utility was prudent in going forward with resource options that were included in the approved plan. The Commission has shown that the DPS approach would affect the ability of utilities and the Commission to respond to changing conditions, and would require the resource planning process more cumbersome.

Subpart 3 Identifies the factors that must be considered by the Commission before issuing its findings of fact and conclusions. Otter Tail Power commented that this subpart confuses "resource options" and "resource plans."

The Commission declined to modify the rule. The rule as originally proposed indicates clearly that the Commission is to evaluate both resource options and resource plans based upon the listed criteria. The Commission has demonstrated that the provision is needed and reasonable.

Otter Tail also urged that item B of subpart 3 reflect that utility rates must be given primary consideration, item C of subpart 3 clarify or delete the word "natural" and the phrase "minimize adverse socioeconomic effects," and item D of subpart 3 be modified to refer to "optimize" rather than "enhance."

The Commission altered the language of subpart 3, item C, to refer to "the environment" rather than "the natural environment," but otherwise declined to modify the proposed rule in response to Otter Tail's comments. The Commission has demonstrated that, while utility rate levels will in most cases be emphasized, it is reasonable to consider both the customers' bills and the utilities' rates in evaluating resource options and resource plans. The Commission has also shown that the term "socioeconomic" is adequately defined in the proposed rules, the term "enhance" is understandable in the context of the proposed rules, and that it would not be appropriate to prescribe in the proposed rules the particular weight to be given to the various factors set forth in subpart 3. The Commission has demonstrated that subpart 3, as modified, is needed and reasonable. The alteration in the language of subpart 3 merely clarifies the proposed rule and does not constitute a substantial change.

There were no adverse comments made concerning subparts 4 and 6 of this rule part, which authorize the Commission in its decision to direct the utility to discuss specific issues in its next resource plan filing and note that the issuance of the Commission's resource plan decision does not limit the authority of other regulatory agencies. Subpart 5, which requires the utility to inform the Commission and other parties to the preceding resource plan proceeding of "changed circumstances that may significantly influence the selection of resource plans" and permits the Commission to decide whether the changes are such that additional administrative proceedings should be held prior to the next regular resource plan proceeding. Otter Tail suggested that this subpart should be modified to require the Commission to respond to the notice of changed circumstances within a particular time frame. The Commission declined to modify the proposed rule. The failure to include the suggested deadline does not render the provision unreasonable.

The Administrative Law Judge thus concludes that the Commission has shown that the provisions of proposed Rule 7843.0500, as modified, are needed and reasonable, and that none of the alterations made to the language of the rule

as originally proposed constitutes a substantial change.

Proposed Rule 7843.0600 -- Relationship to Other Commission
Processes

20. Subpart 1 of this part of the proposed rules indicates, inter alia, that the Commission may terminate a pending proceeding involving construction, acquisition, or disposition of resource options at the time of the utility's resource planning decision if it finds that termination would be in the public

interest. The subpart further provides that "the Commission shall not use the resource planning process as a reason to delay unduly the completion of a proceeding begun under other law." Otter Tail commented that the proposed rules should not permit the Commission to terminate a proceeding needed for adequate and timely rate relief, and suggested that the word "unduly" be deleted from the above-quoted sentence of the subpart. The Commission declined to delete "unduly" since it believes delay should be permitted for good reason. The Commission did, however, modify the language of subpart I in response to the concern over the intent of the proposed rule by deleting all but the last sentence of subpart 1, and thereby removed the discussion of possible termination of other pending proceedings.

In place of that deleted language, the Commission added a new subpart 4. Subpart 4 permits an exemption from the resource plan filing requirements to be granted if the utility submits a request for exemption that indicates an intent to apply for a certificate of need. The new subpart sets forth the conditions that must be satisfied in order to receive the exemption. In its post-hearing comments, DPS proposed that subpart 4 be modified to clarify that the Commission will address during the certificate of need process all of the issues it would normally address in a resource planning process and make decisions with respect to both the certificate of need and the resource planning issues. The Commission declined to modify the rule in accordance with the DPS suggestion. Its failure to do so does not render the rule unreasonable. The Commission has shown that the provisions of the new subpart 4 permitting an exemption from the resource planning requirements where a certificate of need process is to be initiated promotes administrative efficiency, is consistent with the certificate of need legislation, and provides assurance to the utilities that the planning process will not be used to delay other proceedings unnecessarily. The new language is needed and reasonable to permit the Commission to carry out its responsibilities with the greatest efficiency. The deletion of the language in subpart 1 and the addition of subpart 4 does not constitute a substantial change. Several provisions of the rules as originally proposed invited comment on the relationship between the resource planning process and other proceedings, and the rule as modified does not pertain to a new subject matter of significant substantive effect or otherwise result in a rule that is fundamentally different in effect from that

contained in the notice of hearing. See Minn. Rule pt. 1400.1100, subpart 2.

Subpart 2 of the proposed rules provides that the Commission's findings of fact and conclusions in a resource plan proceeding may be officially noticed or introduced in evidence in related Commission proceedings and will constitute prima facie evidence of the facts stated in the decision. The rule emphasizes that substantial evidence may be submitted in the other proceeding to rebut the findings and conclusions.

By operation of Minn. Stat. 216B.33,

all Commission decisions are to be admitted as evidence in any proceeding as to the facts stated in that decision. Resource planning decisions introduced

into evidence under subpart 2 clearly may have an impact on the conduct of other Commission proceedings. For example, in certificate of need cases, the applicant has the burden of justifying the construction of energy facilities.

Minn. Stat. 216B.243, subd. 3. Thus, where the Commission's decision favors

the applicant's desired outcome, the initial burden on the applicant to establish a prima facie case may be satisfied by introduction of the Commission's decision. Of course, the applicant's case may still be rebutted

by other persons. Since the effect of the resource planning decision in another proceeding is only to create a prima facie case relating to the facts

stated therein, however, the facts ultimately found by the Commission may differ from one proceeding to another as different information is presented. More importantly, the conclusions to be drawn from those facts may differ in each proceeding. Since the resource planning decision does not control the outcome of the certificate of need process or any other Commission proceeding, subpart 2 complies with Minn. Stat. 216B.33 and does not conflict with the statutory provisions governing other Commission proceedings. The subpart is needed and reasonable as proposed.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Minnesota Public Utilities Commission gave proper notice of the hearing in this matter.
2. That the Commission has fulfilled the procedural requirements of Minn. Stat. 14.14, and all other procedural requirements of law or rule.
3. That the Commission has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).
4. That the Commission has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. 14.14, subd. 2, and 14.50 (iii).
5. That the additions and amendments to the proposed rules which were suggested by the Commission after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. 14.15, subd. 3, and Minn. Rules pts. 1400.1000, subp. 1, and 1400.1100.

6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such .

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Commission from further modification of the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this 30th day of May, 1990.

BARBARA L. NEILSON
Administrative Law Judge